

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

AT&T's Petition for Forbearance from Certain
Tariffing Rules

WC Docket No. 13-363

**PEERLESS NETWORK, INC.'S
OPPOSITION TO AT&T SERVICES, INC.'S PETITION FOR
FORBEARANCE UNDER 47 U.S.C. § 160(c)**

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Peerless Network, Inc. ("Peerless"), through counsel and pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on November 2, 2016,¹ hereby provides their comments on the Petition filed by AT&T Services, Inc. ("AT&T") on September 30, 2016² seeking forbearance from certain of the Commission's tariffing rules.³ AT&T's Petition fails to demonstrate that: (1) enforcement of such regulations is not necessary to ensure that the charges, practices, classifications, or regulations are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulations is not necessary

¹ *Pleading Cycle Established for Comments on AT&T's Petition for Forbearance from Certain Tariffing Rules*, WC Docket No. 16-363, Public Notice, DA 16-1239 (rel. Nov. 2, 2016) (the "Public Notice").

² *In the Matter of Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Rules For Switched Access Services and Toll Free Database Dip Charges*, WC Docket No. 16-363 (AT&T's "Petition.").

³ The AT&T Petition requests that the Commission forbear from enforcing "all of its rules that allow [Local Exchange Carriers (LECs)] to tariff a charge billed to [interexchange carriers (IXCs)] for toll-free database queries," and the following rules as they apply to certain LEC tandem switched access and transport charges: "47 U.S.C. § 203, 47 C.F.R. §§ 51.901 *et seq.*, 51.913, 61.1, 61.26, 61.47, 69.1 *et seq.*, 69.108, 69.111, 69.118 *et seq.*, and requirements from related Commission Orders 'including but not limited to *in re Provision of Access for 800 Service*, 8 FCC Rcd 907 (1993).'" *Public Notice* at 1.

for the protection of consumers; *and* (3) forbearance from applying such regulations is consistent with the public interest.⁴ The Commission should therefore deny AT&T’s Petition.

I. INTRODUCTION AND SUMMARY

Because a limited unspecified number of Centralized Equal Access (“CEA”) tandem providers have charged AT&T excessive mileage in some rural regions, AT&T has asked the Commission to detariff some, but not all, tandem switched access services for what may turn out to be virtually every operating tandem provider, including the tandem services provided by incumbent local exchange carriers (“LECs”). AT&T Petition at fn. 21. AT&T claims that certain LECs that had previously engaged in terminating end office access stimulation are now partnering with tandem providers, which charge excessive mileage for the transport between these tandems and the terminating end offices. AT&T Petition at 15. But, rather than just using existing FCC procedures to enforce FCC rules that already address that problem,⁵ AT&T proposes a forbearance scheme that shifts to tandem providers the responsibility to “enforce” the Commission’s access stimulations rules.⁶ AT&T proposes an unworkable process that would require tandem providers to determine whether end office LECs subtending the tandem are engaged in access stimulation, and then have those tandem providers self-determine that they cannot charge their tariff tandem rates to AT&T. (*See* Petition at fn. 21 “the forbearance sought applies to all LECs. Thus even if a LEC is not itself engaged in access stimulation, a LEC may not lawfully [bill pursuant to a tariff] for transport or tandem access charges for any calls to or from the [end office] LEC engaged in access stimulation.”).

⁴ 47 U.S.C. § 160.

⁵ *See AT&T Services, Inc. v. Great Lakes Comnet*, 30 FCC Rcd. 2586 (2015), *pet. for review denied in part, granted in part*, 823 F.3d 998 (D.C. Cir. 2016.) (“*Great Lakes Comnet*”).

⁶ 47 C.F.R. § 61.3(bbb).

Peerless recognizes the significant issue that can be associated with mileage pumping, particularly in rural areas. However, AT&T's overly broad proposal unfairly shifts AT&T's problem to tandem services, and has the potential to penalize tandem access providers that may have no way of knowing whether any of their subtending end office LECs are engaged in access stimulation.

The Commission's access stimulation rule is fact intensive. Among other things, it requires a fact determination of whether the end office LEC has a revenue sharing agreement "whether express, implied, written or oral...." 47 C.F.R. § 61.3(bbb). No tandem provider could have access to that information to determine if it could or could not charge AT&T for tariffed tandem transport and switching charges. AT&T's Petition should be denied, and if AT&T has an issue with a mileage pumping tandem provider that serves an access stimulating end office LEC, then AT&T should bring the applicable enforcement action at the FCC, as it did in the *Great Lakes Comnet* case.

The proposal also improperly shifts to tandem providers the burden of enforcing the Commission's access stimulation rules. If the Commission adopts AT&T's proposal, a tandem provider's access charges to IXC's would vary depending on whether or not the minutes of use ("MOUs") are associated with an end office LEC that is an access stimulator. The tandem provider would then have to bill IXC's different, detariffed rates for just these MOUs. If the tandem provider fails to properly identify which LECs are access stimulators, this will lead to further disputes between the IXC's and tandem providers.

AT&T's proposed forbearance of LECs for tariffing and assessing per query database dip charges on toll-free calls should likewise be denied. AT&T's proposal fails to account for the circumstance where no agreement is in place between the LEC and the IXC, risking non-

payment of toll free database charges and increased consumer costs. And, AT&T's proposal greatly exceeds the excessive charges AT&T seeks to address in its Petition. To the extent that the Commission desires to address any excessive tariff database dip charges globally, the Commission should establish a competitive LEC benchmark at the rate of the competing incumbent LEC.

Finally, AT&T's Petition also provides the Commission with insufficient factual evidence to support its request for relief. Section 10(a), 47 U.S.C. §160(a), permits the Commission to forbear from applying regulations where the regulations are not necessary to ensure "just and reasonable practices or rates, forbearance would not lead to discrimination, and forbearance would be consistent with the public interest." AT&T fails to support any of these prerequisites. Instead, AT&T relies heavily on the *CAF Order* as the factual basis for its request. But AT&T's references to the *CAF Order* do not support the standards required by Section 10(a). For example, AT&T references the FCC's factual findings that access stimulation is bad for competition. *See e.g.* AT&T Petition at, *citing CAF Order* ¶ 662-665. But there is no discussion here or in the *CAF Order* about the impact of access stimulation on the tandem service market.

The Commission should deny AT&T's Petition.

II. FORBEARING FROM TARIFF OBLIGATIONS IMPOSED ON TANDEM PROVIDERS IS NOT THE SOLUTION TO MILEAGE PUMPING PROBLEMS.

AT&T's request to detariff all tandem transport and switching charges where the end office LEC is an access stimulator should be denied. As the basis for its Petition, AT&T asserts that "access stimulating LECs are, by traffic volume, the largest carriers in Iowa and South Dakota, and the largest LECs engaged in access stimulation in these two states each carry between three to eight times the traffic volume of the largest price cap LEC in each state...."

AT&T Petition at 15. AT&T claims that the problem with these end office LECs in Iowa and South Dakota is they have substituted the terminating end office local switching revenues, which have been reduced in light of the terminating end office local switching step-downs ordered by the FCC in its *USF/ICC Transformation Order*⁷, with excessive mileage transport charges. AT&T Petition at 10; fn. 18. AT&T emphasizes that “even though the Commission has capped the [local switching rates], these caps can be ineffective in addressing ‘mileage pumping’ schemes, or excessive transport charges billed in association with access stimulation schemes.” *Id.* at fn 17. AT&T further notes that the FCC has been able to address the inequities in mileage pumping schemes, as it did in the *Great Lakes Comnet Decision*. *Id.* at 10.

Rather than let the FCC’s enforcement procedures address the issues raised by AT&T’s Petition, as they did in the *Great Lakes Comnet* case, AT&T proposes to detariff tandem and transport rates charged by the intermediate tandem providers serving the end office LECs engaged in access stimulation. AT&T Petition at 15, fn. 21; Appendix A. Peerless understands that AT&T’s proposal would not only apply to CES intermediate carriers, but would also apply to other tandem providers as well. Under AT&T’s proposal, tandem providers that file tariffs pursuant to § 61.47 (price cap incumbent LECs), 47 C.F.R. § 61.26 (competitive tandem providers), § 69.108 and § 69.111 (non-price cap incumbent LECs) would each be prohibited from tariffing and billing its tariffed tandem transport and switching rates. *See* AT&T Petition, Appendix A. These tandem providers would have to negotiate with AT&T the applicable tandem rates that AT&T would agree to pay.

⁷ See *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (“CAF Order”).

There are at least *three* material problems with this scheme. *First*, AT&T has not proposed how any of these tandem providers would know if a LEC that has an end office subtending to the tandem is engaged in access stimulation. The FCC's access stimulation rule requires a highly factual analysis to determine if a LEC is engaged in access stimulation. An end office LEC is an access stimulator when it meets the following conditions:

61.3(bbb) A rate-of-return local exchange carrier or a Competitive Local Exchange Carrier engages in access stimulation when it satisfies the following two conditions:

- (i) Has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return local exchange carrier or Competitive Local Exchange Carrier is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return local exchange carrier or Competitive Local Exchange Carrier to the other party to the agreement shall be taken into account; and
- (ii) Has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year.

47 C.F.R. § 61.3(bbb).

The tandem provider could never determine whether a LEC satisfied the traffic triggers in § 61.3(bbb)(ii) under AT&T's proposal. To know whether either of these traffic triggers have been met, the tandem provider would have to know all of the subtending end office LEC's minutes of use, not just those minutes of use routed through the homing tandem (*i.e.* including IXC traffic that is direct trunked to the end office). Further, in adopting the rule, the Commission made clear that it was not a mathematic formula to determine if the traffic triggers are met - other factors are to be considered:

A termination-to-originating traffic ratio or traffic growth condition alone could prove to be overly inclusive by encompassing LECs that had realized access traffic growth through general economic development, unaided by revenue sharing. Such situations could include the location of a customer support center in a new community without any revenue sharing arrangement, or a new competitive LEC that is experiencing substantial growth from a small base.

CAF Order, ¶677.

The tandem provider could also never get access to confidential and proprietary customer information to know whether the subtending end office CLEC had a revenue sharing agreement as defined by § 61.3(bbb)(i). In the *CAF Order*, ¶670, the FCC first noted that the revenue sharing agreement itself had to be “associated with access stimulation.” Further, the FCC expressly stated that the net payments under this rule must be predicated on “the sharing of access revenues.” *CAF Order*, ¶ 671. Not all exchanges of payment are considered “revenue sharing.” See, e.g., *Great Lakes Comnet*, 30 FCC 2586, ¶ 15 (rel. Mar. 18, 2015). Instead, the FCC clarified that “[r]evenue sharing may include payments characterized as marketing fees or other similar payments that result in a net payment to the access stimulator.” *CAF Order*, ¶ 670. “[T]his rule does not encompass typical, widely available, retail discounts offered by LECs through, for example, bundled service offerings.” *Id.*

The FCC also noted that certain end user customers, because of the services they provide, are responsible for stimulating access traffic – this includes, for example, “a provider of high call volume operations such as chat lines, adult entertainment calls, and ‘free’ conference calls.” *CAF Order*, ¶ 656. The FCC explained: “[t]he arrangement inflates or stimulate the access minutes ..., then shares a portion of the increased access revenue resulting from the increased demand with the ‘free’ service provider, or offers some other benefit to the ‘free’ service provider.” *CAF Order*, ¶656. For example:

A LEC with high switched access rates will agree to share its access revenues with a company that expects to receive large numbers of incoming calls, such as a

company providing an adult chat line. Because these incentives exist, investment is directed to arbitrage activities, such as “free” conference calling services, the cost of which are ultimately spread among all customers...

CAF Order at ¶ 606.

A tandem provider would have insufficient information to determine what types of calls were being routed through the end office, and would have no knowledge of the contract relationship between those customers and the end office LEC. AT&T’s Petition would require the tandem providers to determine whether the subtending end office LEC is an access stimulator as a precondition to billing the tandem provider’s tariffed tandem rates.

Second, it is not the responsibility of the tandem access provider to make these factual determinations. The FCC has stated that if an IXC has an issue with an access stimulator’s rates, *IXCs* should “file complaints based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition [relating to traffic ratios], i.e., that the second condition has been met.” *CAF Order* ¶ 659. AT&T’s proposal would require a tandem provider to make the determination if a subtending end office LEC is an access stimulator, and then bill IXCs different, off-tariff rates, for the minutes of use associated with just that LEC. For all other LECs, the tandem provider would continue to bill IXCs in the normal process at tariffed rates. This is unworkable, and improperly shifts the burden of enforcing the FCC’s access stimulation rules to the tandem provider.

Third, unless AT&T would expect to exert its market dominance in the long distance market to extract discounted off-tariff rates from tandem providers, it’s not clear what rate benefit AT&T could achieve by detariffing tandem access rates. Even under its own proposal, there is no pricing benefit to AT&T or other IXCs being charged access rates in excess of any applicable benchmark. The FCC has held that where a LEC’s access charges exceed a particular benchmark and are “mandatorily detariffed . . . [d]uring the pendency of negotiation, or if the

parties cannot agree” the IXC would be still be charged the appropriate benchmark rate.⁸ So AT&T is not being saved from having to pay unjust and unreasonable rates, even if a tandem provider’s rates are detariffed. AT&T would still be required to pay the applicable lowest price cap LEC rates under 61.26(g).

What AT&T’s proposal could do is set up a system that would allow AT&T Services, Inc. and other IXCs to discriminate against certain tandem providers in the payment of tandem access charges. If a tandem provider’s switched access and transport rates are detariffed because one of the subtending LECs is an access stimulator, the tandem provider would be required to either negotiate rates with the IXCs, or sue to collect the benchmark that would apply after the rates are detariffed. AT&T’s Petition would require all tandem providers with access stimulating end office LECs to detariff their rates, including AT&T’s incumbent LEC affiliates. AT&T Petition at 15, fn. 21; Appendix A.

AT&T Services, Inc. would surely have no issue reaching an agreement with its incumbent LEC affiliates on off-tariff tandem switching and transport rates. However, AT&T notes there are several alternative tandem providers like Inteliquent, Level 3, and Peerless Network. AT&T Petition at 7. These alternative providers would not have the same ability to reach an agreement with AT&T on appropriate switching and transport rates. If AT&T refused to deal with Peerless if its tandem rates were detariffed because a subtending end office LEC was deemed to be an access stimulator, Peerless could not provide the competitive alternative that AT&T touts in its Petition. AT&T’s Petition is not likely to promote competition in the tandem market, but instead is likely to suppress the competition that the incumbent LEC tandem services now face from these alternative tandem providers.

⁸ *In the Matter of Access Charge Reform*, 8th Report and Order, ¶ 19, FCC Rcd. 9108, 9111 (2004) (“8th Report and Order”).

III. AT&T'S PETITION FAILS TO PROVIDE SUFFICIENT FACTS TO DEMONSTRATE THAT THE COMMISSION MAY FORBEAR FROM THE PROPOSED REGULATIONS

47 U.S.C. §160(a) permits the FCC to forbear from applying “any regulation or any provision of this chapter” if the Commission determines three factors are present: (1) enforcement of the particular regulation is not necessary to ensure “just and reasonable” charges, practices, classifications or regulations, and the forbearance is not “unjustly or unreasonably discriminatory”; (2) enforcement of the regulation is not necessary for consumer protection; and (3) a forbearance is consistent with the public interest. As to the third prong, the Commission “shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”⁹ “The three prongs of § 10(a) are conjunctive. The Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.”¹⁰ AT&T has both the burden of proof and the burden of persuasion to demonstrate that each of the prongs is satisfied.¹¹

The Commission’s rules further require that AT&T’s Petition make a *prima facie case* with facts, which if true, are sufficient to meet these statutory criteria. 47. C.F.R. §1.54(b). Further, the petition must be “complete as filed,” meaning that the petition must include “the facts, information, data” on which AT&T intends to rely to meet each of the statutory prongs.¹²

⁹ 47 U.S.C. §160(b).

¹⁰ *Cellular Telecomms. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (“CTIA”).

¹¹ *Qwest Corp. v. FCC*, 689 F.3d 1214, 1225-26 (10th Cir. 2012), citing *In the Matter of Petition to Establish Procedural Requirements to govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, As Amended*, 24 FCC Rcd 9543, 9554-55, ¶ 20 (2009).

¹² *In the matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act, as Amended*, WC Dkt. No. 07-267, FCC Rcd. 9543, ¶ 17 (Rel. June 29, 2009.)

AT&T's Petition was to have included the necessary facts that identify how each of the three statutory criteria "is met *with regard to each statutory provision or rule*, or requirement from which forbearance is sought." *Id.* If there is any data or other information in the possession of third parties, AT&T's Petition was required to identify the third-party, the nature of the data, and have provided a copy of the Petition to the party possessing any such data. *Id.* Failure to provide evidence to support the request for relief requires the Commission to conclude that the three statutory requirements have not been satisfied.¹³

Appendix A to AT&T's Petition contains the list of regulations for which AT&T seeks FCC forbearance. However, AT&T's Petition contains no evidentiary facts on what the rates are for the "LECs, including intermediate LECs and centralized equal access ("CEA") providers, on calls originated by or terminated to LECs engaged in access stimulation." So, for example, AT&T's request that the FCC forbear from permitting carriers to file tariffs under 47 C.F.R. § 61.1 *et seq.* or 69.1 *et seq.* cannot establish that de-tariffing these charges would result in lower rates (*see* AT&T Petition at 14), increased competition (*id.* at 17), increase investment in IP interconnections (*id.*), or allow AT&T to connect at more just or reasonable rates (47 U.S.C. §160(c)). Indeed, the last four lines of Appendix A to AT&T's Petition, citing 47 C.F.R. § 1.54(e)(3)(ii) and (iii), acknowledges that AT&T's Petition has no "supporting data upon which the petition intends to rely, including a market analysis," and relies on no facts contained in any "supporting statements or affidavits."

AT&T relies heavily on the FCC's *CAF Order* as the factual basis for its request. However, the FCC's conclusions do not support AT&T's request to detariff certain tandem

¹³ See e.g., *In the matter of Feature Group IP Petition for Forbearance from Section 251(g) of the Communications Act and Section 51.701(B)(1) and 69.5(B) of the Commission's Rules*, WC Dkt. No. 07-256, 25 FCC Rcd. 8867, ¶ 16 (Rel. June 30, 2010).

related charges. For example, AT&T relies on the FCC's efforts to transition to a bill and keep pricing methodology as a basis to support its recommendation to detariff tandem charges when the end office LEC is access stimulating. *See e.g.* AT&T Petition at 2, *citing CAF Order* at ¶¶ 738, 742, 798, 800, 1297. However, AT&T's proposal doesn't move either end office or tandem related charges to bill and keep. Under AT&T's proposal and existing FCC rules, even the end office access stimulator is permitted to collect end office switch access rates, but subject to the applicable benchmark rates. 47 C.F.R. ¶61.26(g). It would be inequitable to permit the end office provider that is engaging in access stimulation to be paid tariff rates, while denying any compensation to the tandem provider that is not engaged in access stimulation. Imposing a "bill and keep" arrangement only on the tandem provider is not the "sensible transition path" the FCC intended. *CAF Order*, ¶ 1297.

The FCC also made clear that the "transition path" it was adopting was to address "terminating end office switching and certain transport rate elements ... where the most acute intercarrier compensation problems, such as arbitrage, currently arise." *CAF Order* at ¶ 800. And, the FCC states that "by capping other rate elements to prevent carriers from shifting "costs between or among other [non-terminating end office] rate elements," the FCC has addressed the primary issue that AT&T seeks to resolve in its Petition. *See CAF Order* at ¶ 800.

AT&T complains that access stimulation "causes unreasonable access rates, harms consumers and injures competition – as well as diverting capital from broadband expenditures." AT&T Petition at 3, *citing CAF Order* ¶¶ 662-665. But the FCC found that the injury to competition wasn't at the tandem level; it occurred "by giving companies that offer a 'free' calling service a competitive advantage over companies that charge their customers for the service...." *CAF Order*, ¶ 665. The Commission addressed this problem not by detariffing LEC

rates, but by requiring access stimulators to *tariff rates* at prescribed benchmarks. 47 C.F.R. § 61.26(g). AT&T's proposed solution to its claimed problem conflicts with the Commission's actual solution.

AT&T then argues that the Commission should consider whether forbearance “will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”¹⁴ Peerless agrees that, in considering any petition, the Commission should consider whether AT&T has provided the Commission with any factual evidence that the forbearing from any of the rules requested by AT&T would have public interest effects. But AT&T's references to the *CAF Order* don't support the proposition that detariffing tandem rates would promote competition. Indeed, the FCC concluded that it would address that problem by requiring tariffs but at benchmark rates.

Peerless does not take issue with AT&T's concerns over mileage pumping. *See CAF Order* ¶ 820. And Peerless believes that the *Great Lakes Comnet* decision demonstrates the ability of the Commission to address these problems. However, AT&T's efforts to detariff all transport rates for tandem providers is not consistent with the FCC's conclusion that other than mileage pumping, there were no known problems with existing transport tariffs. The FCC expressly stated that transport charges where the terminating end office carrier does not own the tandem **were not being addressed** by the FCC's transition plan. *CAF Order* ¶ 819.

AT&T failed to support its request with facts. Therefore, the Commission should affirmatively find that AT&T's Petition has not been satisfied.

¹⁴ *Id. citing* 47 U.S.C. § 160(b).

IV. AT&T'S FORBEARANCE FROM TOLL-FREE DATABASE QUERY CHARGES TO LONG DISTANCE CARRIERS IS UNJUSTIFIED

The Commission should likewise deny AT&T's request to detariff competitive LECs database dip charges for toll-free calls to IXCs. AT&T's request identifies the potential for excessive charges by LECs as the unjust and reasonable practice at the heart of its proposal. However, beyond references to an array of different charges for these services by a handful of LECs, AT&T provides no evidentiary support for its proposal that any database dip charge is excessive or unjust and unreasonable, and provides no evidentiary support for its conclusion that LECs artificially inflate their database dip charges to evade the Commission's access stimulation benchmarking requirements. Instead, AT&T's Petition raises the *possibility* that LECs not bound by cost-based charges for their tariffed database dip charges, in the same way incumbent LECs are, could charge excessive rates. This possibility fails to justify AT&T's request that the Commission forbear from tariff requirements for these charges.

As AT&T notes, the Commission originally emphasized that the rates associated with database dip charges for incumbent LECs must be "based only on their database specific costs."¹⁵ And, later, the Commission transitioned the charges to the price cap regime.¹⁶ These requirements ensure incumbent LEC minimum charges for database dip services and would be unaffected by AT&T's proposal. Petition at 77, fn. 23. However, AT&T's proposal calls similar recoveries for competitive LECs for these same services into question by removing the tariff option for LECs.

Just like incumbent LECs, competitive LECs should be able to recover costs associated with providing toll free database dips to IXCs. Providing database dip services entails numerous

¹⁵ Petition at 18-20, *citing* Report and Order, *In the Matter of Provision of Access for 800 Service*, 4 FCC Rcd 2824, ¶74 (1989); 47 C.F.R. § 69.118.

¹⁶ Petition at 19, n. 27.

functions. As SBC (now AT&T), explained, toll free queries originally entailed the following processes:

during all outgoing 800 type Database Service calls the end office switch launches a query to the 800 data base. If the 800 database has a POTS routing number, rather than a CIC, the telephone number is returned and the SSP replaces the original FLEX ANI ii integers with the integer “24” which merely identifies the call as an 800-type call. The “24” coding digit is the industry standard on all switch types to (1) indicate an 800 call, (2) generate the routing to the POTS number, and as a result, (3) create the correct Automatic Message Accounting record.¹⁷

The equivalent of these functions continue to be performed today by LECs.

LECs provide these database dip functions for the benefit of the IXC toll free network, and should be fairly compensated for the costs associated with these services. In the context of toll free calls, the LEC has no control over which IXC provider the customer is dialing because the toll free number is issued for the benefit of an IXC subscriber. To route the call for the benefit of the IXC subscriber, the LEC must perform the database dip functions on its network. AT&T’s proposal would remove the tariff option to recover costs for these services, forcing LECs to either engage in negotiations with *all* potential IXCs that provide toll free services, face non-payment of their services, or have extended disputes relating to routing of toll free calls to an IXC’s subscribers. Under these circumstances, only a tariffed rate would avoid billing disputes and controversies as to the payment for those services.

Furthermore, toll free traffic is not *per se* associated with access stimulation as AT&T’s Petition implies. Because the toll free number is issued for the benefit of the IXC subscriber (to which the call is ultimately routed), the IXC subscriber is the impetus for the volume of calls that are originated and ultimately sent to the IXC, not the originating LEC that assesses the database

¹⁷ In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; SBC Request to Extend Limited Waiver of Coding Digit Requirement, 13 FCC Rcd 11210, 11214, nfn. 24 (rel. Jun. 10, 1998) (citations omitted).

dip charge; the originating LEC has no control over the volume of toll free calls destined to the IXC's customers that generate the costs AT&T incurs. And, to the extent that AT&T asserts improper practices relating to the origination of toll free calling, the Commission's current complaint process permits complaints against those individual LECs improperly assessing excessive and unreasonable costs.

In sum, there is no justification for a global forbearance on competitive LECs tariff charges for toll free database dip charges. AT&T's proposal raises the prospect that competitive LECs will be unjustly and unreasonably discriminated against because IXCs can refuse to enter into negotiations for individual contracts for these services while not paying the LEC for these services. Ultimately, under AT&T's proposal, all of the competitive LECs will be required to share in the burden of providing these services for a few IXC toll free subscribers through increased LEC charges for all consumers because of IXCs non-payment of database dip charges.

In the event that the Commission desires to address excessive charges for toll free database dips globally, Peerless advocates against detariffing those charges. Instead, the Commission should adopt a benchmarking regime to limit competitive LECs' toll free database charges to those charges assessed by the incumbent LEC in the same geographic area. This solution would address any differential and excess database dip charges tariffed and assessed by competitive LECs. And, this solution would be more narrowly tailored to address the specific harm of excess charges complained of in the Petition.

There are justifiable reasons to adopt a benchmarking regime for competitive LECs for database dip charges for toll-free traffic. This proposal would eliminate any excessive charges for these services and would tie the charge directly to the cost to acquire services, all while allowing competitive LECs to recover the costs associated with accessing and providing these

services.¹⁸ Furthermore, this proposal would address AT&T's access stimulation concerns by limiting and preventing excess and unreasonable rates.

Benchmarking competitive LECs tariff charges and assessments satisfies each of the forbearance arguments while more squarely targeting the excess charges about which AT&T is concerned. First, competitive LECs charges would be just and reasonable, and would protect consumers, because a benchmark to incumbent LECs charges for the same service is necessarily tied to the cost of acquiring those services.¹⁹ And, competitive LECs would be incented to pressure database dip providers to lower the wholesale costs relating to these services.

Second, establishing benchmark charges is in the public interest. All unreasonable or excess charges would be eliminated, resulting in lower charges to IXC providers and, ultimately, the consumer. As AT&T correctly states, lower costs will force all LECs to innovate and reduce costs because of competitive pressures.²⁰ As a result of the benchmark, the database charge wholesale market will be subjected to competitive market pressures to increase efficiency of the service and lower the cost of the service. Adopting a database dip benchmark is the best solution for the concern AT&T's Petition raises.

Lastly, Peerless's proposed benchmarking solution does not pose an obstacle to the Commission's bill-and-keep regime for intercarrier compensation, as AT&T suggests.²¹ Toll free database dips have never been included in the Commission's calculus on intercarrier compensation; these charges have historically been segregated and treated separately from

¹⁸ *In the Matter of 800 Data Base Access Tariffs*, Report and Order, 11 FCC Rcd. 15227, ¶ 9 (1996).

¹⁹ *Id.*

²⁰ Petition at 22.

²¹ Petition, 21 n. 33.

intercarrier compensation.²² There is no reason to combine the two now. Rather, permitting competitive LECs to tariff these charges like incumbent LECs, up to a maximum benchmark rate matching the incumbent LEC's charge addresses the concerns raised by AT&T while ensuring that competitive LECs are fairly compensated for the services they provide to IXC providers.

CONCLUSION

For the reasons stated herein and in its initial comments, the Commission should deny AT&T's request for a forbearance from the Commission's tariffing rules described in the *Public Notice*.

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Respectfully submitted,

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²² See *In re Access Charge Reform*, et al., 19 FCC Rcd 9018, ¶¶ 69, 71 (rel. May 18, 2004).